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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1110

MICHAEL J. STAVOLA, *Petitioner*

v.

STATE OF NEW JERSEY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPERIOR COURT OF NEW JERSEY

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The petitioner, Michael J. Stavola, prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Superior Court of New Jersey affirming petitioner's conviction entered by the Superior Court of New Jersey, Law Division, Monmouth County.

OPINION BELOW

The opinion of the Appellate Division of the Superior Court of New Jersey is reprinted in the Appendix at p. 1a. The Supreme Court of New Jersey's Denial of Certification is reprinted in the Appendix at p. 21a.

JURISDICTION

The judgment of the Appellate Division of the Superior Court of New Jersey, affirming petitioner's conviction was entered on August 3, 1973. The petition for certification to the Supreme Court of New Jersey was denied on October 2, 1973. Mr. Justice Brennan signed an order, December 29, 1973, extending the time for filing this petition to and including January 15, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the defense of entrapment should be "constitutionalized" and made applicable to the state courts through the due process clause of the Fourteenth Amendment of the United States Constitution.

2. Whether the petitioner was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment because the trial court failed to sever a co-defendant, Martinelli, when it was clear that evidence admitted against only Martinelli was severely prejudicial to Stavola and because the court failed to distinguish between petitioner's conduct and that of Martinelli in its instructions.

THE CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

THE FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

THE FOURTEENTH AMENDMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 22, 1971, after a jury trial, petitioner, Michael J. Stavola, and a co-defendant, Joseph Martinelli, were convicted of bribery and obstruction of justice. Martinelli was also convicted of attempting to induce a police officer to commit misconduct in office.

Prior to trial Stavola had moved for severance on the grounds that he could not get a fair trial with Martinelli. This motion was denied. Stavola's defense was that he had been entrapped.

In September, 1970, the Monmouth County, New Jersey, Grand Jury returned an indictment charging Stavola with assault and battery on a municipal police officer, Dennis J. Vaspori, and obstructing Officer Vaspori in the performance of his duties.

On October 29, 1970, Joseph Martinelli, then an employee of Stavola, mentioned the fact of this indictment to Detective James Sweeney of the New Jersey State Police. Martinelli next met Sweeney at the Coach Restaurant on December 17, 1970, and told him that if anybody could help Stavola with his problem they could "Write their own ticket" (II.Tr. 43-44). This conversation was reported to Sweeney's superior, Detective William Turner (I.Tr. 293). Turner directed Sweeney to attempt to set up a meeting with Stavola and to record everything that was said (I.Tr. 271). Pursuant to Turner's orders, Sweeney then made several telephone calls to Martinelli on December 17 and 18 to arrange a time for Martinelli to introduce Sweeney to Stavola (III.Tr. 527). These calls were tape recorded by Sweeney (II.Tr. 56, 60).

On December 18, 1970, Sweeney, after placing tape recording equipment on his body, went to the Carriage House Restaurant where he conversed with Martinelli out of Stavola's presence and then met Stavola (II.Tr. 68-70). At this meeting, the question of money is brought up first by Sweeney (III.Tr. 557-560). Sweeney then left Martinelli to make a telephone call; on his return, Martinelli took him to meet Stavola (II.Tr. 70). Sweeney said he knew of Stavola's problem. Stavola told Sweeney that the only way to handle it was to get the policeman to tell the truth (III.Tr. 334, 419). There was no mention of money being paid to Sweeney during this conversation (III.Tr. 336-338). After Stavola ended his conversation with Sweeney and left, Sweeney and Martinelli continued to discuss what was to be done. Sweeney pointed out that Stavola was "not too committed" to the plan (III.Tr. 358).

Martinelli called Sweeney several times during the months of January and February, 1971. However,

Stavola did not contact Sweeney during this period. On February 23, 1971, Sweeney called Martinelli and asked him to set up a meeting with Stavola (IV.Tr. 891). Martinelli arranged to meet Sweeney later that day. Sweeney, driving a vehicle equipped with a microphone and tape recorder, met Martinelli outside the Carriage House Restaurant (II.Tr. 112). During this conversation, Sweeney noted again that in their initial meeting Stavola had been very non-committal.

On February 25, 1971, in the parking lot of the Carriage House Restaurant, Sweeney met with Stavola for the second time. Martinelli was also present (II.Tr. 137-138). The part of the conversation which occurred in Sweeney's auto was taped by a recorder hidden in the rear seat (II.Tr. 139). Stavola's tape recorded statements at this meeting primarily consisted of monosyllabic responses to Sweeney's comments about Stavola's situation. Then Sweeney told Stavola that the prosecutor would play on the fact that he was Italian and successful, thus denying him a fair trial. It was Sweeney, not Stavola, who first mentioned that a "deal" could be made with a specific prosecutor and a specific judge. Sweeney lied to Stavola telling him that if he were convicted, the statute required that he be sentenced to no less than two, no more than seven years and that he be fined $2,000. (Part of the conversation between Sweeney and Stavola occurred outside Sweeney's auto and was thus not recorded.) Sweeney testified that Stavola asked him what it would cost to fix the case. Sweeney replied he did not know what the price would be to reach the judge and the prosecutor. But he arranged to meet Stavola at the Holiday Inn the following day (II.Tr. 150).

The next day Sweeney met Stavola at the Holiday Inn and told him that the price would be $5,000 each for three people: the prosecutor, the judge and "the guy that's setting it up." Later that day in the parking lot of the Colts Neck Inn, Stavola handed Sweeney $5,000 and then left the scene (II.Tr. 158-160). Both conversations were recorded by electronic devices concealed in Sweeney's automobile. These tapes were played for the jury (II.Tr. 157, 162).

Stavola moved for mistrial several times on the grounds that the joint trial with Martinelli unfairly prejudiced Stavola because of conversations between Martinelli and Sweeney were admitted against Martinelli. In these conversations, Martinelli discussed the possibility that he would "fix" other cases and that he was involved with several well-known persons who were under indictment or had been convicted of bribery. These motions were denied.

Part of Stavola's entrapment defense was based on the theory that Martinelli acted as an unwitting agent of the government. He requested an instruction to the effect that if the jury found Martinelli was an unwitting agent of the government, then it could consider that fact in determining whether Stavola was entrapped.[1] This instruction was denied.

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[1] "1. In considering the issue of entrapment with reference only to the defendant Stavola you should consider if the defendant Martinelli either knowingly or unwittingly was being utilized by Det. Sweeney for the purpose of communicating their conversations or any portions thereof to the defendant Stavola. If you so find then the conduct and actions of defendant Martinelli as well as the conduct and action of Sweeney as communicated to the defendant Stavola may be considered by you members of the jury in determining if Michael Stavola was entrapped." (V. Tr. 440)

REASONS FOR GRANTING THE WRIT

I.

This petition raises a substantial question of federal law that is of particular importance because it bears on the question of whether the due process clause requires minimum standards which the states must observe when the defense of entrapment is raised.

From *Sorrells* v. *United States,* 287 U.S. 435 (1932) through *Sherman* v. *United States,* 356 U.S. 369 (1958) to *United States* v. *Russell,* 411 U.S. 423 (1973), this Court, while recognizing entrapment as a valid defense, has been unable to agree on the legal basis for the defense. This has caused significant confusion and controversy in the state and lower federal courts whenever the entrapment defense is raised. This Court has recently given voice to what has only been hinted at in some of the cases sustaining the entrapment defense—that the foundation for the entrapment defense is due process. In *United States* v. *Russell,* 411 U.S. 423 (1973) the majority opinion stated:

> "While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, . . . the instant case is distinctly not of this breed." [Citation omitted], 411 U.S. 431-432.

This statement for the first time recognized that entrapment may have a legal basis in the principles of due process. If entrapment is grounded on the constitutional basis of due process, then these principles should apply no less in the state courts than they do in the federal courts.

That the entrapment defense has a due process basis has been suggested by the language of several cases. In *Butts* v. *United States,* 273 F.35 (8th Cir. 1921) the Court of Appeals reversed a lower conviction for sale of morphine, characterizing entrapment as "unconscionable and contrary to public policy and the established law of the land," 273 F.35 at 38. *Butts* was cited with approval of Chief Justice Hughes, speaking for the majority in *Sorrells.* Chief Justice Hughes found it would have been "shocking to the sense of justice," 287 U.S. 446, and "abhorrent to the sense of justice," 287 U.S. 449 to allow Sorrells' conviction to stand.

In *Accardi* v. *United States,* 257 F.2d 168 (5th Cir. 1958) the court, after a thorough analysis of the majority and concurring opinions in *Sherman,* points out that:

> "In spite of the sharp differences between the two opinions as to the crucial question in entrapment, the conceptual basis for the defense, and the role of the court, the language of the majority of the court, shows that they attach almost as much importance as the minority to the *conduct of the government agents* [Emphasis in original]. *There is scarcely a decibel's difference in their expressions of shock and outrage at the agents' methods.*" [Emphasis supplied] 257 F.2d at 172-173, n.5

The court held "the agent's conduct [did] not shock the conscience . . ." and thus there was no entrapment as a matter of law.

In *Banks* v. *United States,* 249 F.2d 672, 674 (9th Cir. 1957), the court said of entrapment "A conviction so procured is in violation of the due process provision of the Fifth Amendment. . . ."

In *Russell* v. *United States, supra,* this Court recognized that "The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the due process clause of the Fifth Amendment." 411 U.S. 432. One commentator has pointed out that, ". . . the judicial characterizations of entrapment and of due process violations are oftentimes strikingly similar." He also states that due process affords "the more solid foundation" than "the sheer fiction of Sorrells' statutory interpretation." Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons,* 49 J. of Crim. L., Criminology and P.S. 447, 449 (1959).

In the instant case, Detective Sweeney, through Martinelli, pursued Stavola until he finally took the bait and paid the bribe. The conduct of Sweeney is shocking to the universal sense of justice and clearly violates that fundamental fairness mandated by the due process clause. The following facts show that Sweeney, pursuant to orders by his superior, Turner, solicited a bribe from Stavola.

After Martinelli told Sweeney that if anybody could help Stavola they could "Write their own ticket," Detective Turner ordered Sweeney to set up a meeting with Stavola and to record the conversation (III.Tr. 516). At the meeting of December 18, 1970, Stavola said, not that he wanted to bribe Sweeney to fix the case but rather, that the only way to handle the matter was to have the policeman tell the truth (III.Tr. 334, 419). There was absolutely no mention of money by Stavola. Indeed, Sweeney, in his own words, characterizes Stavola's position at the December 18 meeting as "not too committed" to the plan (III.Tr. 358).

When Sweeney did not hear from Stavola for over six weeks, he asked Martinelli to set up a meeting with Stavola (III.Tr. 362, IV.Tr. 891). He told Martinelli, "The only thing is, I want him to commit himself" (Tape of February 23, 1971). When Sweeney met with Stavola on February 25, 1971, Stavola's tape recorded statements consisted of monosyllabic responses to Sweeney's comments about Stavola's situation. It was Sweeney, not Stavola, who suggested a "deal" could be made with a specific prosecutor and a specific judge.[2] He also lied to Stavola about the punishment he could receive. At this point Stavola swallowed the bait in the trap conceived in the minds of Sweeney and Turner. But it was clearly only as a result of Sweeney's blandishments.

In *Sherman* v. *United States, supra,* this Court pointed out "the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was "the product of *creative* activity of law-enforcement officials" (emphasis in the original), 356 U.S. 369, 372. If Stavola had been tried in a United States District Court, the evidence would have required the granting of a motion for judgment of acquittal at the close of the government's case because the "criminal design originate[d] with the officials of the government, and they implant[ed] in the mind of an innocent person the disposition to commit the alleged offense," *Sorrells* v. *United States,* 287 U.S. 435, 442.

The standards applicable to entrapment in the federal courts should be the minimum standards observed by the state courts. "Clearly entrapment is a facet of

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[2] Since this is the crucial conversation which shows that Stavola was entrapped by Sweeney, it is reprinted in the appendix at p. 23a.

a broader problem. Along with illegal search and seizures, wire tapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement." Donnelly, *Judicial Control of Informants, Spies, Stoolpidgeons and Agent Provocateurs,* 60 Yale L. J. 1091, 1111 (1951): The entrapment defense is analogous to the exclusionary rule in illegal search and seizure cases because both are directed at preventing improper police conduct. Illegal searches and seizures are expressly forbidden by the Fourth Amendment, while entrapment has not been recognized as constitutionally grounded. In *Olmstead* v. *United States,* 277 U.S. 438 (1928), the Court held that illegally obtained wiretap evidence could not be excluded because such conduct was not specifically barred by the Constitution. However, the Court has since departed from the narrow view upon which that decision rested and held that the "underpinnings of *Olmstead* . . . have been so eroded that the doctrine there enunciated can no longer be regarded as controlling." *Katz* v. *United States,* 389 U.S. 347, 353 (1967). The Court should now recognize that the better legal basis for the entrapment defense is due process.

Entrapment, one of the devices of lawless law enforcement, cannot be tolerated because it is "unfair" "unconscionable" and "shocking to the universal sense of justice". The defense of entrapment, grounded in the due process clause of the Fifth Amendment, is thus applicable to the states through the Fourteenth Amendment because it is fundamental to our principles of liberty and justice. *Palko* v. *Connecticut,* 302 U.S. 319, 328 (1937).

In the instant case, the principles governing entrapment in the federal courts would have required the

granting of judgment of acquittal. In *United States ex rel. Hassel* v. *Mathues,* 22 F.2d 979 (E.D.Pa. 1927) the court found entrapment, as a matter of law upon operative facts, identical to the facts in this case. Morris and Max Hassel were owners of a brewery. Morris, out of the presence of his brother, offered $500 to a prohibition agent, Hurley, who was watching the brewery. After talking with his colleague, Hurley ". . . told Morris Hassel that he did not want to talk to him; he wanted to talk with Max Hassel." A few days later the agents met Max and Morris Hassel and the Hassels paid them $1,250. Both Hassels were charged with bribery and held for the Grand Jury. Max obtained a writ of *habeas corpus* contending that he had been entrapped. The Court agreed and said:

> "There is no evidence to establish the fact that there was any thought in Max Hassel's mind of offering a bribe to the prohibition officers until *Agent Hurley,* after suggestion of bribery made by Morris Hassel, *had made the latter his agent to bring Max Hassel to the officers and have him take part in the plans for bribery."* [Emphasis supplied.]
>
> * * * *
>
> "While the first suggestion, looking toward the commission of the criminal act, was made by Morris Hassel to the officers, the suggestion which induced a criminal intent in Max Hassel originated with the officers, merely to entrap Max Hassel into the commission of a crime suggested to him [Max Hassel] by them [prohibition officers] through the agency of his brother, Morris Hassel." 22 F.2d 979-980.

Martinelli, like Morris Hassel, may have first suggested the bribe, but later became Sweeney's agent to entrap Stavola in the bribery. The evidence shows

that Stavola, like Max Hassel, had no intention of offering a bribe until he was brought into the scheme by Sweeney through Martinelli. Therefore, the principles applied in *Hassel* should have been applied here.

The Third Circuit Court of Appeals reversed bribery convictions on the ground of entrapment in *Klosterman* v. *United States,* 248 F.2d 191 (3rd Cir. 1958). In that case the evidence showed that while Deeney, an IRS agent, had initially considered a bribe offer from Klosterman, he later abandoned the bribery scheme; but he had been lured back into the scheme after numerous solicitations by a government agent. The court held that Deeney participated in the bribery scheme because of the agent's activity and was therefore entrapped as a matter of law. In the instant case, Sweeney's stated objective was to get "a committal from Stavola" (III. Tr. 378). Sweeney first approached Stavola through Martinelli (III. Tr. 532); he initiated conversations about money with Martinelli (III. Tr. 560-561); he told Stavola he could not get a fair trial because he was Italian and successful; he lied to Stavola (III. Tr. 396), telling him the penalties for assault and battery on a police officer were far greater than they actually were (III. Tr. 397). This is the kind of "creative activity" by government agents which was condemned in *Klosterman* and *Sherman.* Here, as in those cases, the activity should have been deemed entrapment as a matter of law.

II.

The petitioner was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment because the trial court failed to sever Martinelli when it was clear that evidence admissible

against only Martinelli was severely prejudicial to Stavola, and because the court failed to distinguish between petitioner's conduct and that of Martinelli in its instructions.

Stavola's defense was based upon two theories of entrapment. First, that Sweeney entrapped him on February 25, 1971, when Sweeney said he would make a deal with the judge and the prosecutor. Second, he was entrapped by Martinelli who, as Sweeney's agent, conveyed the fact that Sweeney would make a "deal" for him. As to both aspects of his entrapment defense, it was crucial to prevent the conversations of Martinelli and Sweeney, properly admissible only against Martinelli, from being considered in determining Stavola's guilt or innocence.

(a)

This Court has recognized that when there is a joint trial, there is danger that the adverse evidence against some defendants will improperly rub off on the co-defendants. In *Blumenthal* v. *United States,* 332 U.S. 539, 559-560 (1947), the Court stated "Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions are insufficient to ward off the danger entirely. It is therefore extremely important that these safeguards be made as impregnable as possible." In *United States* v. *Kelley,* 349 F.2d 720 (2nd Cir. 1965), where the evidence against defendant, Shuck, in a stock fraud case was less extensive and incriminating than against his co-defendants, the Court held that Shuck was prejudiced by the introduction of evidence against the co-defendants which "must have stamped

them [co-defendant] in the eyes of the jurors as unscrupulous swindlers of the first rank", 349 F.2d at 759.

The same danger that arose in *Kelley* arose in the instant case. On October 29, 1970, Martinelli initiated conversation with the New Jersey State Troopers about helping Stavola with the problem of his indictment for assault and battery. (II. Tr. 43-44). Martinelli arranged to have Sweeney meet Stavola on December 18, 1970 (III. Tr. 527). Martinelli by his own admission called Sweeney ten to fifteen times in January and February, 1971, to find out what progress Sweeney was making and he met with Sweeney on February 23, 1971. (IV. Tr. 873). During these conversations, none of which were admissible against Stavola, Martinelli offered to fix future cases with Sweeney (IV. Tr. 990-991), and to become a "bag man" (IV. Tr. 994). These tape recorded statements were played for the jury. It is clear from these statements the jury could only infer that Martinelli's impetus to engage in future case-fixing activity came from his "fixing" this case. This clear indication of Martinelli's predisposition had to rub off on Stavola.

The prosecutor brought out on cross-examination of Martinelli the fact that he knew Frank Mallamaci who had been indicted in a widely publicized trial for bribery (IV. Tr. 973-977). The fact of Martinelli being associated with Mallamaci and Joe Zicarelli, equally notorious, was not relevant to any of the charges against either Stavola or Martinelli and it was not admissible against Stavola. The court instructed the jury not to consider the references to Martinelli's knowledge of the Mallamaci indictment in determining Stavola's guilt. (IV. Tr. 988). These references

marked Martinelli as an unscrupulous briber. Here, as in *Kelley,* the evidence properly admissible against Martinelli alone rubbed off on Stavola, improperly prejudicing him.

(b)

Petitioner's defense was that of entrapment. Indeed, it was the crucial issue in the case because it was never denied that Stavola had handed Sweeney $5,000. Since it was the basic issue in the case it was particularly important that the instructions to the jury were clear and unequivocal. *United States* v. *Silver,* 457 F.2d 1217 (3rd Cir. 1972). One aspect of Stavola's entrapment defense was that he had been entrapped by Sweeney using Martinelli as his agent. He requested an instruction to that effect.[3] The instruction was not given. The evidence showed that Sweeney used Martinelli to contact and arrange meetings with Stavola. With the exception of the meeting of February 26, 1971, all meetings between Sweeney and Stavola were set up by Martinelli. The tape recordings contained statements by Martinelli that he was in effect acting as an agent of Stavola. The court instructed that agency could not be established only by statements of the agent, but must be determined on all the facts (V. Tr. 312-313). However, the court did not instruct that Martinelli could also have been acting as an agent of Sweeney. Thus the jury was only instructed on the prosecution's theory of agency and was never allowed to consider one aspect of Stavola's theory of defense which was supported by the evidence. The jury could have found that Martinelli was Sweeney's agent for soliciting a bribe. This would have been sufficient

[3] See fn. 1.

to establish the defense of entrapment. The trial judge's refusal to give the requested instruction constituted error. *Lufty* v. *United States,* 198 F.2d 760 (9th Cir. 1952), *Levine* v. *United States,* 261 F.2d 747 (D.C. Cir. 1958).

The trial judge's failure to give Stavola's requested instructions combined with the evidence admitted solely against Martinelli, which severely prejudiced Stavola, denied Stavola a fair trial within the meaning of the due process clause of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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